lice enforcement policies be made public in the form of administrative rules in order to provide public input and review of the policies, to increase uniformity of application, to provide guidelines to individual officers, and to provide notice to the public of the standard of behavior expected of them. K. Davis, *Police Discretion* (1975); H. Goldstein, *Policing a Free Society* (1977). This section also conforms to the *ACA*, standard 4315:

> Written guidelines should specify misbehavior that may be handled informally. All other minor rule violations and all major rule violations should be handled through formal procedures that include the filing of a disciplinary report.

Although this section limits the officer's discretion (for example, an officer may not handle a major offense, such as fighting, informally), there is still considerable scope for the officer's judgment, for example, in deciding whether the inmate is likely to commit the offense again. The officer's experience can guide him or her in making this judgment better than a detailed rule could. Also, even if the officer *may* handle a rule violation informally, this section does not require the officer to do so when in his or her judgment discipline is needed.

Sub. (1) (d) refers to the purposes of the individual sections and the rules generally in HSS 303.01. A statement of the purpose of each disciplinary rule in this chapter can be found in the note to that section. These notes in some cases give examples of situations where the rule should normally not be enforced. For example, the note to HSS 303.40, Unauthorized transfer of property, states that: "[C]onduct reports [should] not [be] written for petty and harmless violations of this section, such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier."

Note: HSS 303.66. If an officer has decided, using the guidelines in HSS 303.65, that counseling or warning an inmate is not the best response to a particular infraction, the next step is to write a conduct report. The contents of the conduct report are described in sub. (2). A conduct report is the first step for all three types of formal disciplinary procedures: summary punishment, minor offense hearing and major offense hearing.

If the officer did not personally observe the infraction, sub. (1) requires that he or she investigate any allegation to be sure it is believable before writing a conduct report. An informal investigation by the reporting officer can save the time of the adjustment committee by weeding out unsupported complaints, and can also provide additional evidence to the adjustment committee if any is found. Also, it is fairer to the inmate to spare him a hearing when the officer cannot uncover sufficient evidence.

Sub. (3) provides that there should be a conduct report for each action which is alleged to violate the sections. If one action violates three sections only one report is required. Presumably, the report would list the sections violated and state the relevant facts. This is an effort to avoid unnecessary use of forms.

There is no "statute of limitations" for writing the report. Rather, the guiding factor, when there is time between the alleged offense and the conduct report, should be whether the inmate can defend himself or herself and not be unfairly precluded from doing so due to the passage of time.

Note: HSS 303.67. A conduct report is the initial step in the formal disciplinary process. It can be written by any correctional staff member. Unless the accused inmate admits the charges and submits to summary punishment (see HSS 303.74), the next step is review by the security office. The purpose of the review is to improve the consistency of the reports so that the rules are used in the same way in all reports, and to check the appropriateness of the charges in light of the narrative description section of each report. The review is not a substitute for continuing supervision and training of officers to make sure they all use the rules in the same way; however, it can serve as a tool in the supervision of officers while at the same time making sure that an inmate is not forced to go through a hearing based on an inappropriate charge, or conversely is not let off because the violation charged was under the wrong section.

If summary disposition of the case has already occurred, the security office also reviews the conduct report. The same type of review for the appropriateness of charges should be made, as well as a review of the appropriateness of writing a conduct report (see HSS 303.65) and of the appropriateness of the sentence imposed. The security director may reduce the punishment or charges, if a violation has been treated summarily but may not add to them, since summary punishment is based on consent of the inmate and the inmate has only admitted the charges which were originally written on the conduct report. Only if the conduct report and the punishment are approved may a record of the violation be included in the inmate's files.

Note: HSS 303.68. For the reasons given in the note to HSS 303.64 and in *Wolff v. McDonnell*, 418 U.S. 539 (1974), greater procedural safeguards are used when a greater punishment is possible. The dividing line between the 2 types of formal hearing is the same as the one used in *Wolff, supra*. If segregation or loss of good time is imposed, then all of the *Wolff* safe-

guards apply. If other lesser punishments are used, then a less formal procedure is used. In order to preserve the option of using a major punishment, the security office will designate a conduct report as containing a "major offense" whenever it seems possible that either segregation or loss of good time will be imposed by the adjustment committee. Some offenses must *always* be considered major offenses; these are listed in sub. (3). Violations of other sections will be considered individually and it is left to the security director's discretion whether to treat an offense as major or minor. However, guidelines for the exercise of this discretion are given in sub. (4).

When a security director treats an offense as a major offense, as allowed by sub. (4), the security director should indicate in the record of the disciplinary action some reason for that decision based on the criteria enumerated under sub. (4).

Note: HSS 303.69. This section reflects the conditions in adjustment segregation as they already exist at most institutions. The purpose of this section is to promote uniformity among all the institutions, to make sure minimum standards are met and to inform inmates what to expect.

Adjustment segregation lasts a maximum of 8 days, so very spartan conditions are permissible. However, visiting and mail rights are protected by the first amendment. See *Procunier v. Martinez*, 416 U.S. 396 (1974); *Mabra v. Schmidt*, 356 F. Supp. 620 (W.D. Wis. 1973).

While extra good time is not earned in this status, fractions of days are not deducted. See the departmental rules on extra good time and compensation.

Note: HSS 303.70. This section reflects the conditions in program segregation as they already exist at at least one institution. The purposes of this section are to promote uniformity among all the institutions, to make sure minimum standards, possibly required by the eighth amendment's "cruel and unusual punishment" clause are met and to inform inmates what to expect.

Subsection (3) clarifies what personal property inmates in program segregation may keep in their cells. Inmates may not keep electronic equipment or typewriters in their cells except as allowed by a particular institution's written policy. Each institution is expected to have a policy designed to motivate inmates to improve their behavior in segregated statuses so that they will be permitted to move into the general population of the institution.

Since program segregation may last for almost one year (or longer if a new offense is committed), the conditions are not as spartan as in adjustment segregation. In particular, more personal property is allowed and there is an opportunity to take advantage of programs. Sub. (7). A person's stay in program segregation may not be extended and he or she may be released at any time through the procedure established under this section.

Note: HSS 303.71. Controlled segregation is not intended as punishment but, as its name implies, it is to be used where it has been impossible to control a person in segregation. The purpose of the section is to promote uniformity in the use of controlled segregation and make sure minimum standards are met. In particular, incoming and outgoing mail is still allowed as if the inmate were not in segregation. This is a logical extension of *Procunier v. Martinez*, 416 U.S. 396, (1974). See also *X v. Gray*, 378 F. Supp. 1185 (E.D. Wis. 1974), aff'd 558 F. 2d 1033; *Vienneau v. Shanks*, 425 F. Supp. 676 (W.D. Wis. 1977).

Note: HSS 303.72. This section describes each of the minor penalties which may be imposed. The purpose of this section is to standardize the punishments used so that an inmate's disciplinary record is easier to understand, and to inform inmates of what to expect. There should be no referral to the program review committee for reclassification if a minor penalty is imposed, unless there has been a recent accumulation of such penalties.

Note: HSS 303.73. A number of rules cover conduct which is sometimes a criminal offense. However, many petty matters would probably not be prosecuted by the district attorney even if brought to his attention—for example, gambling. Also, in most cases, even outbreaks of violence are handled through disciplinary procedures rather than by prosecution. This section requires the superintendent to work with the district attorney in developing a policy on prosecution of crimes committed within the institution. The frustration and waste of time involved in referring cases which are dropped can be avoided, as well as the possibility of failing to refer a case which ought to be prosecuted. Naturally, the final decision is left up to the district attorney (sub. (2) (b)).

In developing the policy on referrral, it will become obvious that the disciplinary rules do not follow the criminal statutes exactly. Some crimes are not covered by the disciplinary rules. These are generally "white collar" crimes which are unlikely to be committed in prison. Some rules cover both criminal and non-criminal activities. An example is HSS 303.43, Possession of intoxicants, which covers possession of alcohol as well as prescribed drugs. The

notes to the individual sections explain the differences between each rule and the similar criminal statute.

Sub. (3) provides that disciplinary procedure can go forward even if the case will also be prosecuted as a criminal offense. This option is often needed for control because criminal procedure takes a long time and because a criminal conviction merely lengthens an inmate's sentence without changing the conditions of confinement. For some inmates, a longer sentence is very little deterrent. Also, it provides no protection to potential victims because the offender is not segregated from the general population. There is no double jeopary in having both a disciplinary hearing and a criminal trial on the same matter. See *Baxter v. Palmigiano,* 425 U.S. 308 (1976).

Note: HSS 303.74. The availability of summary disposition avoids the necessity of a disciplinary hearing when the inmate agrees to summary disposition. Summary disposition is only allowed in relatively minor cases, those where the punishment is only one of the punishments listed in sub. (5). To further limit the possibility of abuse, any summarily-imposed punishment must be approved by the shift supervisor. Sub. (4). Also, summary punishments must be reviewed and approved by the security office before being entered in the inmate's disciplinary record or other files. See HSS 303.67.

In the recent past, summary disposition has not been used extensively. A hearing was held on all offenses. This section thus streamlines disciplinary procedure in minor, uncontested cases. One purpose of the section is to encourage summary disposition, where appropriate.

Note: HSS 303.75. The hearing procedure for minor violations, often called an "informal hearing," has several safeguards to protect the inmate from an erroneous or arbitrary decision. It is used in the following situations: (1) When the inmate did not agree to summary disposition, because he or she contested the facts or for some other reason; (2) When the appropriate punishment, if the inmate is found guilty, is more severe than permitted on summary disposition but not so severe as to require a full due process hearing; and (3) When the inmate waives a due process hearing.

The protections present in the minor hearing procedure are: subsection (1)—notice of charges; subsection (2)—specific time limits for the hearing and opportunity to waive them; subsection (3)—an impartial hearing officer; subsection (4)—opportunity for the inmate to explain or deny the charges; subsection (5)—a decision based on the preponderance of the evidence; subsection (6)—the right to appeal; and HSS 303.85—no records are kept in any offender-based file if the inmate is found not guilty.

The *ACA*, standard 4334, Discussion, draws the line between "major" and "minor" violations in a different place: "Minor violations usually are those punishable by no more than a reprimand or loss of commissary, entertainment or recreation privileges for not more than 24 hours." Because minor penalties as defined in HSS 303.68 include several which are more severe, the minor offense disciplinary procedure is somewhat more formal than that recommended by the *ACA*.

Note: HSS 303.76. HSS 303.76, 303.78, and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974).

Subsection (1) concerns notice. With respect to notice, the Supreme Court said:

> We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

In accordance with *Taylor v. United States,* 414 U.S. 17 (1973), the inmate is informed that if he or she refuses to attend the hearing, the hearing may be held without the inmate being present.

Subsection (2) concerns waiver. When an inmate waives a hearing for a major due process violation, he or she waives all rights associated with that type of hearing and has only the rights associated with hearings for minor violations. Waiver includes waiving the right to question or confront witnesses. Just as a criminal defendant may waive his or her right to a trial, so an inmate accused of a disciplinary offense can waive his or her right to a due process hearing. In that case, a hearing of the type used for minor offenses is held. The inmate still has an opportunity to make a statement, there is an impartial hearing officer, a decision is based on the evidence, and an entry in the records is made only if the inmate is found guilty. See s. HSS 303.75 and Note.

To ensure that any waiver is a knowing, intelligent one, the inmate must be informed of his or her right to a due process hearing and what that entails; be informed of what the hearing

will be like if he or she waives due process; and be informed that the waiver must be in writing.

A waiver is not an admission of guilt.

Subsection (3) concerns time limits, which are the same as those under s. HSS 303.75.

Subsection (4) allows the hearing to be held at one of a number of places. In the past, disciplinary hearings were held only at the institution to which the inmate was assigned at the time of the misconduct. Transfer brought disciplinary proceedings to an end. This was undesirable for a variety of reasons. Therefore, this section provides for hearings at the new location.

Generally, it is desirable to provide hearings where the violation occurred. This practice is current division policy. Sometimes, this is impossible, particularly in the camp system. When it is impossible, fairness requires that the inmate have the same protections where the hearing is held as he or she would have at the institution where the violation is alleged to have occurred.

Subsection (5) prescribes a hearing procedure for major offenses which complies with the requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974). Those requirements are:

(a) "A written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." *Morissey v. Brewer*, 408 U.S. 471, 489 (1972).

(b) The inmate is allowed to call witnesses and present documentary evidence in his or her defense if permitting him or her to do so will not jeopardize institutional safety or correctional goals.

(c) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings. Such procedures in the current environment, where prison disruption remains a serious concern, must be left to the discretion of the prison officials.

On cross-examination and confrontation of adverse witnesses, the court said:

In the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many states, including Nebraska, and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries. *Id.* at 568.

Subsection (5) does not greatly limit the Adjustment Committee's discretion to prohibit cross-examination and confrontation, as it appears to do, because of the fact that the witness need not be called at all. The committee may rely on hearsay testimony if there is no reason to believe it is unreliable. See HSS 303.86, Evidence.

Subsection (6) requires that the committee give the inmate and his or her advocate a written copy of the decision. The Supreme Court stated about this requirement:

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action. *Morrissey*, 408 U.S. at 489, 92 S. Ct. at 2604. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb. Rev. Stat. s.83-185(4) (Cum. Supp. 1972), and are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no

conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974).

Subsection (7) gives the inmate the right to appeal an adverse decision. Appeal is not required by *Wolff v. McDonnell*; in fact, an opportunity for appeal is not even an element of required due process in a criminal proceeding. *Griffen v. Illinois*, 351 U.S. 12 (1956). Appeal or review is one of three ways of controlling discretion, according to Kenneth Culp Davis. The other 2 are limiting discretion by placing outer limits on it, and structuring discretion by listing guidelines or factors to be considered. Appeal increases uniformity in decision-making, may eliminate or reduce abuses of discretion, and provides an opportunity for the superintendent to review the work of his or her subordinates in handling disciplinary cases.

Note: HSS 303.78. Subsection (1) provides the inmate in a disciplinary hearing with a limited choice of advocates to permit avoidance of conflict-of-interest problems. The choice of an advocate, however, is not the inmate's constitutional right. Paragraph (b) provides a procedure for giving inmates a choice of advocates in institutions that use volunter or assigned advocates who are regular staff members. Paragraph (c) provides for a different procedure in institutions that employ permanent advocates. This rule allows the institution to assign advocates and to regulate their caseloads. If an inmate objects to the assignment of a particular advocate because that advocate has a known and demonstrable conflict of interest in the case, the institution should assign a different advocate to the inmate. An inmate has no due process or other right to know the procedure by which a particular advocate is selected in a particular case.

Note: HSS 303.81. The inmate facing a disciplinary proceeding for a major violation should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other documentary evidence.

This new rule requires the adjustment committee or hearing officer to state on the record its reason for determining that a witness need not be called. It is hoped that stating on the record the reasons for refusing to call a witness will facilitate review of disciplinary proceedings. The adjustment committee may determine that a witness should not be called because the testimony would be irrelevant, unnecessary, or due to other circumstances in an individual case.

The decision of whether to allow a witness to testify has been delegated to a hearing officer. Sub. (2). The time for making requests is limited under sub. (1), in order to give the hearing officer an opportunity to consider the request prior to time for the hearing, which normally must be held within 21 days. See HSS 303.76 (3).

Sub. (3) lists the factors to be considered in deciding whether to call a requested witness.

Subs. (4), (5) and (6) indicate that signed statements are preferable to other hearsay, but other hearsay may be relied on if necessary.

Subs. (7) and (9) provide that the same hearing officer who considers the requests for witnesses is also the person to schedule the hearing and notify all participants. There is a time limit on the hearing—it must be 2 to 21 days after notice to the inmate. See HSS 303.76 (3).

Sub. (8) forbids interviewing members of the public and requesting their presence at hearings without the hearing officer's permission. Members of the public are not permitted to attend hearings. Such people are usually employes and school officials who are involved in work and study release. There is no authority to compel their involvement in hearings. More importantly, requesting their involvement or permitting adversary interviewing seriously jeopardizes the programs by making the people unwilling to cooperate. It also creates the possibility that there will be harassment of such people. Instead, the work release coordinator should get whatever information these people have and provide it to the committee.

Note: HSS 303.82. *Wolff v. McDonnell*, 418 U.S. 539 (1974), requires that the adjustment committee members be impartial in the sense that they should not have personally observed or

been a part of the incident which is the basis of disciplinary charges. However, the court specifically held that a committee member could be "impartial" even if he or she was a staff member of the institution. Nevertheless, this section encourages some diversity on panels with 2 or 3 members.

The use of one and 2 member committees is a recent development. There are 2 principal reasons for it. The camp system has never held due process hearings because of the fact that the staff is small and it is impossible to involve staff from distant institutions. For example, some camps have as few as 4 staff members. To provide a 3 person committee and an advocate and to prevent the complainant from being one of these people is impossible. Of course, there would be no one to supervise the camp during the hearing, either. The conflict between the desire to have due process hearings at the camps and limited resources is resolved by permitting smaller committees.

The problem of available staff also exists at larger institutions. So many staff can be tied up in the process that other important functions are neglected. It is thought that fairness can be achieved by relying on smaller committees while other correctional objectives are also achieved.

Note: HSS 303.83. This section sets out the considerations which are actually used in deciding, within a range, how severe an inmate's punishment should be. It does not contain any formula for deciding the punishment. The actual sentence should be made higher or lower depending on the factors listed. For instance, if this is the fourth time the inmate has been in a fight in the last year, his or her sentence should be greater than average, unless other factors balance out the factor of the bad record.

The purpose of this section is to focus the committee's or officer's attention on the factors to be considered, and to remind them not to consider other factors such as personal feelings of like or dislike for the inmate involved.

Note: HSS 303.84. There are 2 limits on sentences which can be imposed for violation of a disciplinary rule: (1) A major punishment cannot be imposed unless the inmate either had a due process hearing or was given the opportunity for one and waived it. Major punishments are program and adjustment segregation and loss of good time; and (2) Only certain lesser punishments can be imposed at a summary disposition. See HSS 303.74. This section limits both the types and durations of punishments.

In every case, where an inmate is found guilty of violating a disciplinary rule, one of the penalties listed in sub. (1) must be imposed. Cumulative penalties may be imposed. For example, if adjustment segregation is imposed, program segregation or loss of good time or both may also be imposed. The inmate will then serve his or her time in each form of segregation and lose good time. Similarly, more than one minor penalty may be imposed for a single offense. A major and minor penalty may be imposed for a major offense.

Sentences for program segregation may only be imposed for specific terms. The possible terms are 30, 60, 90, 120, 180 and in some cases, 360 days. This is contrary to, for example, adjustment segregation where terms from 1-8 days may be imposed. The specific term represents the longest time the inmate will stay in segregation unless he or she commits another offense. However, release prior to the end of the term is possible. HSS 303.70 provides that a placement in program segregation may be reviewed at any time and must be reviewed at least every 30 days.

The terms in sub. (2) (a) are *maximums* and should be imposed rarely.

The limits on loss of good time which are found in sub. (2) (b) are required by s. 53.11 (2), Stats. This statute lists the number of days of good time which can be lost to 5 for the first offense, 10 for the second, and 20 for each subsequent offense. This section also creates an intermediate stage of the loss of 15 days. In addition, this section follows current practice by limiting loss of good time to serious offenses. On the other hand, loss of good time must be imposed by the committee or hearing officer—it is never automatic. See HSS 303.68-303.72 and notes.

Note: HSS 303.86. This section makes clear that the rules of evidence are not to be strictly followed in a disciplinary proceeding. Neither the officers nor the inmates have the training necessary to use the rules of evidence, which in any case were developed haphazardly and may not be the best way of insuring the reliability of evidence. Thus, a more flexible approach is used. The main guidelines are that the hearing officer or committee should try to allow only reliable evidence and evidence which is of more than marginal relevance. Hearsay should be carefully scrutinized since it is often unreliable: the statement is taken out of context and the demeanor of the witness cannot be observed. However, there is no need to find a neatly labeled exception; if a particular piece of hearsay seems useful, it can be admitted.

Subs. (3) and (4) address the problem of the unavailable witness. Sub. (3) contemplates that the statement and the identity of the maker will be available to the accused. Sub. (4) permits the identity of the witness to be withheld after a finding by the committee or hearing officer that to reveal it would substantially endanger the witness. This is not often a problem, but it does arise, particularly in cases of sexual assault. To protect the accused, it is required that there be corroboration; that the statement be under oath; that the content of the statement be revealed, consistent with the safety of the inmate. In addition, the committee or hearing officer may question the people who give the statements.

Sub. (5) deals with the handling of information received from a confidential informant. This information will not be placed in the inmate's case record where it would be accessible to him or her, but will be filed only in the security office.

Note: HSS 303.87. This rule is to make clear that technical, non-substantive errors on the part of staff in carrying out the procedures specified in this chapter, may, if harmless, be disregarded. For example, if an inmate is not served with an approved conduct report within the time specified, this would be harmless unless it affected the inmate's right to present a defense in a meaningful way. This rule conforms to present practices.